MOHANA DASS VELAYUTHAM v. PP

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
MOHAMED ARIFF YUSOF JCA
VARGHESE GEORGE JCA
[CRIMINAL APPEAL NO: S-05-59-02-2013]
30 DECEMBER 2014

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Accused person convicted for offence of trafficking in dangerous drugs – Drugs discovered in bag carried by accused person – Defence of innocent carrier – Whether accused person had knowledge of drugs concealed in bag – Whether defence probable – Whether direct evidence of trafficking proved – Whether trial judge considered core defence – Dangerous Drugs Act 1952, s. 39B*

EVIDENCE: *Witness – Non-calling of witness – Accused person convicted for offence of trafficking in dangerous drugs – Drugs discovered in bag carried by accused – Allegation that bag was packed by another person – Bag contained ill-fitting clothes – Whether non-calling of material witness detrimental to prosecution's case*

The appellant had went on a trip to Shenzen, China with one Vikneswaran and one Ah Meng ('DW2'). On their fourth day in Shenzen, DW2 came to the appellant's room with one silver trolley bag ('P23'). Upon stepping out of the hotel's bathroom, DW2 told the appellant that the zipper on the bag which he had brought from Malaysia was damaged and DW2 had transferred all the appellant's belongings, along with Vikneswaran's clothes, into P23. They then headed to the airport. At the airport in Shenzen, the appellant was told to handle P23 and it was only on the aeroplane did DW2 give the appellant the key to P23. When they arrived at the Kota Kinabalu International Airport, the appellant took P23 for scanning. While scanning P23, the customs officer saw suspicious images inside P23. A physical examination of P23 revealed a secret compartment concealing eight transparent plastic packets containing whitish crystalline powder which were later confirmed to be 4,674.3g of ketamine. At the High Court, the appellant was charged under s. 39B of the Dangerous Drugs Act 1952 ('DDA') for the offence of trafficking in dangerous drugs. In his defence, the appellant denied knowledge of the drugs and claimed to be an innocent carrier. At the conclusion of the trial, the trial judge found that DW2's evidence was contrary to the accused's own evidence. The trial judge further found that there was lack of evidence on the length of time the appellant was in the bathroom. The appellant was convicted for the offence and sentenced to death. Hence, the present appeal. The issues that arose for the court's consideration were (i) whether the trial judge was correct in convicting the appellant for the offence of trafficking as the prosecution had failed to adduce

direct evidence of trafficking; (ii) whether the trial judge made reference to s. 2 of the DDA; and (iii) whether the trial judge considered the core defence of the appellant.

Held (allowing appeal; acquitting and discharging appellant)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) It is an error to make a finding of mere denial without evaluating all the evidence adduced throughout the trial. Not every denial is a mere denial. The trial judge did not give sufficient consideration to the evidence adduced at the trial as a whole. At the conclusion of the trial, the trial judge was required to consider all the evidence adduced before the court and only then decide if the prosecution had proved its case beyond reasonable doubt. (paras 55 & 56)

(2) The prosecution had not proved a charge against the appellant beyond reasonable doubt. The appellant's denial of any knowledge that he was carrying dangerous drugs in P23 was not a mere denial. It was supported by evidence adduced during the defence stage as well as the prosecution stage. The appellant's conviction was clearly unsafe. (paras 108, 109 & 110)

(3) The evidence of DW2 and DW4 supported the appellant's evidence that he went to Shenzen from Kuala Lumpur and to Kota Kinabalu from Shenzen with DW2 and Vineswaran and that all arrangements were not made by him but for him. DW2 also admitted that he made the arrangements for the hotel. From DW2's evidence and the independent evidence of DW4, it was clear that the appellant played no part in making any of the travel and lodging arrangements for the trip to Shenzen and from Shenzen. (paras 62, 65 & 66)

(4) It was not unreasonable or improbable for the appellant's clothes as well as Vikneswaran's clothes to be transferred and packed into P23 in the time the appellant spent in the shower. The appellant testified that he had brought a change of clothes into the shower. In other words, the appellant's time in the shower included the time he would take to change into his clothes. (para 79)

(5) The trial judge did not address the appellant's evidence that P23 also contained clothes belonging to Vikneswaran. The evidence of the ill-fitting clothes supported the appellant's evidence that P23 was not packed by him and that the bag contained the appellant's as well as Vikneswaran's clothes. (paras 81 & 84)

(6) The absence of Vikneswaran's evidence and his version of the events, especially the packing of P23, created a gaping hole in the case against the appellant. The absence of Vikneswaran's evidence meant that when all the evidence adduced until the conclusion of the whole trial was re-evaluated, doubts had arisen as to the knowledge of the appellant with regard to the drugs hidden in P23. (paras 87 & 89)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah mengadakan satu lawatan ke Shenzen, China dengan seorang yang bernama Vikneswaran dan seorang lagi iaitu Ah Meng ('DW2'). Pada hari keempat mereka di Shenzen, DW2 datang ke bilik perayu membawa sebuah beg troli berwarna perak ('P23'). Apabila keluar dari bilik mandi hotel, DW2 memberitahu perayu bahawa zip pada beg yang dibawa oleh perayu dari Malaysia telah rosak dan DW2 telah memindahkan barang-barang perayu, bersama-sama dengan pakaian Vikneswaran, ke dalam P23. Mereka kemudiannya menuju ke lapangan terbang. Di lapangan terbang Shenzen, perayu diberitahu agar menjaga P23 dan hanya di dalam kapal terbang barulah DW2 memberikan kunci P23 kepadanya. Setibanya di Lapangan Terbang Kota Kinabalu, perayu mengambil P23 untuk diimbas. Semasa mengimbas P23, pegawai kastam melihat imej yang mencurigakan dalam P23. Pemeriksaan fizikal P23 mendedahkan satu bahagian rahsia yang menyembunyikan lapan paket plastik lutsinar yang mengandungi serbuk putih kristal yang kemudiannya disahkan sebagai 4,674.3g ketamine. Di Mahkamah Tinggi, perayu dipertuduh di bawah s. 39B Akta Dadah Berbahaya 1952 ('ADB') bagi kesalahan mengedar dadah berbahaya. Dalam pembelaannya, perayu menafikan pengetahuan mengenai dadah-dadah tersebut dan mendakwa dirinya adalah pembawa tidak bersalah. Di penutup perbicaraan, hakim bicara mendapati bahawa keterangan DW2 bercanggah dengan keterangan tertuduh sendiri. Hakim bicara memutuskan selanjutnya bahawa tiada keterangan terhadap tempoh masa perayu di dalam bilik mandi. Perayu disabitkan atas kesalahan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini. Isu-isu yang berbangkit bagi pertimbangan mahkamah adalah (i) sama ada hakim bicara betul dalam mensabitkan perayu atas kesalahan pengedaran kerana pihak pendakwaan gagal mengemukakan keterangan langsung pengedaran; (ii) sama ada hakim bicara membuat rujukan kepada s. 2 ADB; dan (iii) sama ada hakim bicara mempertimbangkan teras utama pembelaan perayu.

Diputuskan (membenarkan rayuan; melepaskan dan membebaskan tertuduh)

Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Adalah satu kekhilafan untuk membuat dapatan penafian semata-mata tanpa menilai kesemua keterangan yang dikemukakan sepanjang perbicaraan. Tidak semua penafian adalah penafian semata-mata. Hakim bicara gagal memberikan pertimbangan secukupnya kepada keterangan yang dikemukakan di mahkamah secara menyeluruh. Di penutup perbicaraan, hakim bicara perlu mempertimbangkan kesemua keterangan yang dikemukakan di mahkamah dan hanya selepas itu memutuskan sekiranya pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah.

(2) Pihak pendakwaan tidak berjaya membuktikan pertuduhan terhadap perayu melampaui keraguan munasabah. Penafian perayu akan pengetahuan bahawa dia membawa dadah berbahaya dalam P23 bukanlah penafian semata-mata. Ia disokong oleh keterangan yang dikemukakan semasa peringkat pembelaan dan juga peringkat pendakwaan. Sabitan perayu jelas tidak selamat.

(3) Keterangan DW2 dan DW4 menyokong keterangan perayu bahawa dia pergi ke Shenzen dari Kuala Lumpur dan ke Kota Kinabalu dari Shenzen dengan DW2 dan Vineswaran dan kesemua perancangan tidak dibuat olehnya tetapi untuknya. DW2 juga mengaku bahawa dia membuat perancangan bagi hotel. Daripada keterangan DW2 dan keterangan bebas DW4, adalah jelas bahawa perayu tidak memainkan peranan dalam membuat perancangan urusan perjalanan dan penginapan bagi lawatan ke Shenzen dan dari Shenzen.

(4) Bukan tidak munasabah atau tidak mustahil bagi pakaian perayu dan juga pakaian Vikneswaran dipindahkan dan dilipat ke dalam P23 semasa perayu sedang mandi. Perayu memberi keterangan bahawa dia membawa persalinan pakaian ke dalam bilik mandi. Dalam kata lain, masa perayu di dalam bilik mandi termasuk masa yang diambil olehnya untuk menyalin pakaiannya.

(5) Hakim bicara tidak menangani keterangan perayu bahawa P23 turut mengandungi pakaian milik Vikneswaran. Keterangan pakaian yang tidak muat menyokong keterangan perayu bahawa P23 tidak disiapkan olehnya dan bahawa beg tersebut mengandungi pakaian perayu dan juga Vikneswaran.

(6) Ketiadaan keterangan Vikneswaran dan versinya mengenai kejadian-kejadian, khususnya persiapan P23, membentuk satu lompong besar dalam kes terhadap perayu. Ketiadaan keterangan Vikneswaran bermakna semasa kesemua keterangan yang dikemukakan hingga penutup keseluruhan perbicaraan, keraguan telah timbul mengenai pengetahuan perayu tentang dadah-dadah yang tersembunyi di dalam P23.

Case(s) referred to:

Leow Nghee Lim v. Regina [1955] 1 LNS 53 HC ***(refd)***
Lim Guan Eng v. Public Prosecutor & Other Appeals [1998] 3 CLJ 769 CA ***(refd)***
Mat v. Public Prosecutor [1963] 1 LNS 82 HC ***(refd)***
Ong Ah Chuan v. Public Prosecutor & Koh Chai Cheng v. Public Prosecutor [1980] 1 LNS 181 PC ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 180(3), 182A, 422
Dangerous Drugs Act 1952, ss. 2, 37, 39B(3)
Evidence Act 1950, s. 154

For the appellant - PJ Perira; M/s PJ Perira & Co
For the prosecution - Luke Ressa Balang; DPP

[Appeal from High Court Sabah & Sarawak, Kota Kinabalu; Criminal Trial No: BKI-45D-1-10-2011]

Reported by Najib Tamby

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This is the appellant's appeal against the decision of the High Court of Sabah and Sarawak at Kota Kinabalu, Sabah, on 8 February 2013 which convicted the appellant of the charge against him under s. 39B of the Dangerous Drugs Act 1952 ("DDA") for the offence of trafficking in 4,674.3g of ketamine, a dangerous drug. The appellant was sentenced to death and ordered to be hanged by the neck until he is dead.

[2] We heard the appeal on 12 September 2014 and after examining the record of appeal and reading and hearing the submissions of the learned Deputy Public Prosecutor and learned defence counsel, we allowed the appeal and acquitted and discharged the appellant of the charge against him.

The Charge

[3] The provisional charge (dated 12 August 2011 against the appellant (as read to him in the Magistrate's Court) was as follows:

> Bahawa kamu pada 31 JULAI 2011, lebih kurang jam 04.40 petang di Unit Khas Pemeriksaan Penumpang (UKPP), Balai Ketibaan Antarabangsa, Terminal 2, Lapangan Terbang Antarabangsa Kota Kinabalu, di dalam Bandar Kota Kinabalu, dalam negeri Sabah, telah didapati mengedar dadah berbahaya iaitu Ketamine anggaran seberat 5,786.9 gram, dan dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B(i)(a) Akta Dadah Berbahaya 1952 (Akta 234) yang boleh dihukum di bawah Seksyen 39B(2) Akta Dadah Berbahaya 1952 (Akta 234)

[4] The consent of the Public Prosecutor under sub-s. 39B(3) of the DDA was issued on 21 October 2011. That consent however states that the weight of the ketamine is 4,674.3g. We examined the record of appeal but found no amendment made to the charge, nor any new charge framed and tendered and read to the appellant with the new weight of the ketamine. However, in our considered view, having read the notes of proceedings before the High Court, that error/omission did not occasion any failure of justice and therefore s. 422 of the Criminal Procedure Code applies.

Evidence Adduced During The Case For The Prosecution

[5] In brief, the evidence adduced during the case for the prosecution was as follows.

[6] On 31 July 2011 PW4, Customs Officer Muhammad Hafiz, was on duty at the passenger examination section at Terminal 2 of the Kota Kinabalu International Airport.

[7] Around 4.30pm, Air Asia flight No. AK 6413 arrived at the terminal. The passengers were directed to have their baggage scanned. One of them was the appellant. He was carrying a black laptop bag, a grey trolley bag and a box of lychees.

[8] When the grey trolley bag was scanned, PW4 saw some suspicious images, being several square objects within the bag. He asked PW5 (Customs Officer Johnny Amit) to further inspect the bag. They found nothing unusual in the bag itself. A second scan was done, this time after removing the contents of the bag. The suspicious images were still there.

[9] After the second scan, PW4 examined the inner bottom layer of the bag and found that it was displaced. He pulled the layer and found that there was a secret compartment beneath the layer and plastic layer below it, and saw white powder in transparent plastic packets.

[10] PW4 then informed his shift leader who directed that the appellant and the bag and its contents be taken to the shift leader's room.

[11] Several customs officers from the Narcotics Enforcement Branch then were summoned to the Kota Kinabalu Airport. These included PW3 (Jason Lazarus), PW6 (Alzendra K Johnny Upin) and PW7 (Aderis bin Ambutit). PW3 and PW6 then did a thorough examination of the base of the grey trolley bag. Upon finding unusual bulges on the floor of the bag, PW6 prised open the floor of the bag using a screwdriver. They found eight transparent plastic packets containing whitish crystalline powder.

[12] The appellant, the grey bag (later marked in court as P23) and its contents, and the eight packets were subsequently handed over to PW8 (Fardly Harris bin Salleh), who was assigned to be the investigating officer for this case.

[13] The eight packets of whitish powder were sent to the Chemistry Department. PW1, the chemist (Ahmad Nazri bin Husin), examined and analysed the powder in the eight packets. PW1's finding was that the powder in the eight packets contained a total of 4,674.3g of ketamine.

Decision At The Conclusion Of The Case For The Prosecution

[14] The learned High Court Judge ruled, at the conclusion of the case for the prosecution, that the prosecution had proved a *prima facie* case on the charge against the appellant and the appellant was called upon, under sub-s. 180(3) of the Criminal Procedure Code, "to enter on his defence" on the charge against him.

Defence

[15] Four witnesses gave evidence during the defence stage of the trial. The appellant was the first witness (DW1). The other witnesses were Chin Kon Hee (DW2), M Vijayan a/l Munusamy (DW3) and Terence Au Soon Fui (DW4).

[16] The appellant's defence was essentially that he did not know of the presence of the eight packets of ketamine in the secret compartment at the base of the grey bag.

[17] According to the appellant, some time before the date of the incident he had lent RM4,000 to one Vikneswaran for the latter's sister's wedding. Their families knew each other.

[18] He and Vikneswaran had gone to the Mines Wonderland in Sungai Besi, Selangor. There they met a person whom he referred to as "Ah Meng". This person was subsequently identified and gave evidence as DW2.

[19] It was Vikneswaran who asked the appellant if he wanted to go to Shenzen. The appellant said he did not, at that time, know where Shenzen was. When Vikneswaran told him Shenzen was in China, the appellant said he expressed his reservations about going there as neither he nor Vikneswaran could speak Chinese. However Vikneswaran told him DW2 would be going with them and would act as their guide.

[20] The appellant testified that as it did not appear that he would ever get paid for the RM4,000 loan he gave Vikneswaran, he decided to go to Shenzen as Vikneswaran would pay for the tickets which would cost RM2,000. According to the appellant he thought this would be the only way of obtaining part repayment of the loan given to Vikneswaran.

[21] The arrangements for the trip, according to the appellant, were made by DW2 and Vikneswaran. DW2 was the one who checked them into their hotel room in Shenzen, and took them to their room. The appellant and Vikneswaran shared a room.

[22] The next day, they went shopping. The appellant bought handphones. It was DW2 who acted as interpreter and who bargained for them. They then went back to the hotel where a separate room had been booked for Vikneswaran for the night. The appellant and Vikneswaran had a female "companion" each, arranged for by DW2.

[23] On the fourth morning of their trip to Shenzhen, the appellant said Vikneswaran answered a call from DW2 who told them to get ready as they would leave for Malaysia. What happened next would be the critical part of the appellant's evidence.

[24] According to the appellant, Vikneswaran went into the bathroom first to shower. While he was in the bathroom, DW2 came with his girlfriend. The appellant let them into the room. DW2 had with him one black sling bag and one "silver" bag. The "silver" bag was the grey bag marked P23.

[25] When Vikneswaran came out of the bathroom, the appellant went into the bathroom to shower. He took along a change of clothes.

[26] When he came out of the bathroom, he found that his clothes had been packed. He was told that they were packed in the "silver" bag. He said DW2 told him the zipper on the bag the appellant brought from Malaysia was damaged and he (DW2) had transferred all the appellant's belongings into the "silver bag". The handphones the appellant bought were placed in the black sling bag.

[27] The appellant also testified during cross-examination that Vikneswaran also packed his own clothes inside P23 as the lock on Vikneswaran's bag was already damaged before they left Kuala Lumpur.

[28] DW2 and Vickneswaran then, according the appellant, checked them out and paid the bills for their stay at the hotel. The four of them (including DW2's girlfriend) went to the airport in a taxi. DW2's girlfriend left the airport in the same taxi.

[29] At the airport, the appellant said he was told by Vikneswaran that they were not going to Kuala Lumpur but instead were going to Kota Kinabalu. DW2's girlfriend would join them there. The appellant went along.

[30] The appellant was told to handle the biggest bag (the grey bag) because by size he was the biggest. He dragged the grey bag to be scanned and then checked it in.

[31] All three of them were seated in a row beside each other on the journey from Shenzen. Vikneswaran sat in the middle. It was on the aeroplane that Vikneswaran gave the appellant the key to the grey bag. Vikneswaran kept one of the keys to the bag.

[32] When they arrived at Kota Kinabalu Airport, and went to retrieve their bags, the grey bag arrived first. Vikneswaran told the appellant to take the bag and go out first and get a taxi for them while they waited for their bags.

[33] The appellant then took the bag and was walking out of the baggage reclaim area when he was stopped by the custom officers.

[34] The rest of the appellant's version was similar to the prosecution's version of the events on that day.

[35] DW2 was arrested and spent about three months, according to him, in Sungai Buloh Prison, having been arrested upon his arrival at Terminal 2, KLIA, from Kota Kinabalu in relation to a drug offence. His testimony was not helpful to the appellant's defence. Most of his answers to the questions asked of him were evasive answers.

[36] DW3 is Vikneswaran's father. Beyond confirming that Vikneswaran is his son, and a friend of the appellant and that Vikneswaran had left DW3's house around April 2012 after DW3's daughter ran away from home after a fight with DW3, not much in DW3's evidence was of any assistance to the appellant.

[37] DW4 was Air Asia's duty manager at the material time and was in court to testify on the reservations made with the airline for Shenzen and Kota Kinabalu destinations for the appellant and his two companions.

Decision At The Conclusion Of The Trial

[38] At the conclusion of the whole trial, the learned trial judge found that the defence collapsed due to the evidence of DW2 which was contrary to the accused's own evidence. His Lordship held that the appellant was bound by the evidence of the witness he called.

[39] The learned trial judge also placed importance on the lack of evidence on the length of time the appellant was in the bathroom. His Lordship appeared to have linked that to the manner in which the drugs were concealed in the grey bag (P23).

[40] His Lordship's conclusion was that the appellant's defence was a mere denial.

[41] His Lordship further found that the appellant's explanation "is not reasonable and probable", and that "his defence has not cast a reasonable doubt on the prosecution case or of his guilt".

[42] The learned judge therefore found that the prosecution had proved the charge against the appellant beyond reasonable doubt and convicted him of that charge. The appellant was sentenced to death being the mandatory penalty as provided for under s. 39B of the DDA.

Grounds Of Appeal

[43] We consider the following grounds in the petition of appeal to be the appellant's main grounds of appeal:

(a) the learned trial judge erred in convicting the appellant for the offence of trafficking as the prosecution should have adduced direct evidence of trafficking but failed to do so;

(b) the learned trial judge failed to make reference to s. 2 of the DDA and discuss it;

(c) the learned trial judge failed to consider the core defence of the appellant.

A **Analysis**

At The Conclusion Of The Prosecution's Case

[44] We are of the considered view, after examining the record of appeal, in particular the evidence adduced until the conclusion of the prosecution's
B case as we have briefly set out above, and the grounds of judgement and the submissions of the learned Deputy Public Prosecutor and of the learned counsel for the appellant, that the learned trial judge did not err in his finding that *prima facie* case had been proved by the prosecution on the charge of trafficking against the appellant and in calling upon the appellant to enter on
C his defence on that charge.

At The Conclusion Of The Trial

[45] The appellant's defence was that of "passive carrier" or "innocent carrier", in that he denied having any knowledge of the drugs kept in the hidden compartment at the base of the grey bag.

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[46] The learned trial judge did not use any of the presumptions in s. 37 of the DDA against the appellant. His Lordship found actual possession and actual trafficking against the appellant, and found that the appellant's evidence did not raise any reasonable doubt.

E **[47]** The term "trafficking" is defined in s. 2 of the DDA as follows:

> "trafficking" includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying or distributing any dangerous drugs
F otherwise than under the authority of this Act or the regulations made under this Act;

[48] A long line of authorities from as long ago as *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 1 MLJ 28 has held that possession must be possession with *mens rea* or knowledge, whether proved by direct evidence
G or by invoking the available presumption. Further, trafficking can only be said to have been proved if the accused person does the acts falling within the definition of trafficking with the knowledge of the drugs in question and that the drugs are dangerous drugs.

[49] Numerous authorities, including the Privy Council decision in *Ong*
H *Ah Chuan v. Public Prosecutor & Koh Chai Cheng v. Public Prosecutor* [1980] 1 LNS 181; [1981] 1 MLJ 64 and the Federal Court decision in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129; [2006] 3 MLJ 193, have held that the mere act of carrying or transporting the dangerous drugs which are the subject matter of the charge is not sufficient to constitute the offence of
I trafficking in those drugs.

[50] On possession, at the conclusion of the prosecution's case the learned trial judge found possession to have been proved *prima facie* due to the fact that the appellant was the one who had control and custody of the drugs through his possession of the keys to the grey bag and the manner in which the drugs were concealed in the bag.

[51] However, we note that the learned trial judge had neglected to re-evaluate that finding at the conclusion of the whole trial to determine if, after hearing the evidence of the appellant and the other defence witnesses together with the evidence given at the prosecution stage, reasonable doubt had arisen on the appellant's knowledge.

Judicial Appreciation Of Evidence

[52] We are troubled by the learned trial judge's finding that the appellant's defence collapsed when DW2 evidence did not support that defence. His Lordship said that in the case of in *Lim Guan Eng v. Public Prosecutor & Other Appeals* [1998] 3 CLJ 769, at p. 788 "this is what the court says on the nature of DW2's testimony":

> Now among the general rules that govern judicial appreciation of evidence in both civil and criminal cases in the adversarial system of justice there is one of fundamental importance, a party is bound by the evidence of witnesses whom he calls in proof of his case.

[53] We have referred to the judgement of the Court of Appeal in *Lim Guan Eng*'s case referred to by the learned trial judge, and found that the passage quoted above is part of a longer statement on the position to be taken in judicial appreciation of evidence. We reproduce below what was actually stated by the Court of Appeal:

> Now, among the general rules that govern judicial appreciation of evidence in both civil and criminal causes in the adversarial system of justice, there is one of fundamental importance. It is that a party is bound by the evidence of witnesses whom he calls in proof of his case. The rule is enforced with full rigour in civil cases. See *M. Ratnavale v. S. Lourdenadin* [1988] 2 MLJ 371.
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> However, the law, recognising that much depends upon the human factor and vagaries of life, refuses to lay down any absolute rule in the matter of evidence evaluation. Witnesses are but human. Testimony may often be coloured by emotion, benign or malicious. Not all witnesses speak the whole truth, despite the oath or affirmation administered to them. Not all witnesses are devoid of bias of one sort or another. Recollection of events is seldom, if ever, perfect. Two or more persons witnessing the same incident may give varying, yet truthful, accounts of it according to their perception. There are so many other imponderables. The law would fail to meet the needs of society whose affairs it regulates if it does not take into account the incalculable variables that enter upon the scene when questions of appreciation of evidence arise.

In no case is this especially true as in the trial of criminal cases where the Public Prosecutor initiates the court's process in the public interest. The Public Prosecutor is often compelled to call witnesses to formally establish facts that are necessary for the unfolding of the story that lies at the heart of his case. Some of these witnesses may, by reason of close relationship or loyalty, exhibit a natural bias in favour of the accused. They may, out of eagerness to help the accused, furnish answers under cross-examination that are favourable to the defence and stretch the truth to the point of incredulity. If the general rule is applied with unbending strictness in such cases, substantial justice will not be achieved. The approach that is to be adopted by a trial court in such cases appears in the judgment of Wan Yahya J, (as he then was) in *Hj Abdul Ghani Ishak & Anor v. Public Prosecutor* [1981] 2 MLJ 230. His Lordship there said (at pp. 232, 233):

> It was submitted by Mr Edgar Joseph Jr counsel for the first accused, that his client had not been proved to have had any interest in the application; that the only direct evidence on this had come from Kipah and that she had stated in evidence that she was making the application at the behest of her uncle, the second accused. Counsel further submitted that as she was a witness called by the prosecution, this court should not reject her evidence. He stressed that the prosecution could not blow hot and cold at the same time and that the whole of her evidence had to be accepted *in toto*. Counsel referred to the Indian case of *Abinash Chandra v. Emperor* (1936) 37 Cr. LJ 439 and, in particular, to p. 442, which reads as follows:
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> > The Crown has suggested, though not in so many words, that we ought to look with suspicion upon the evidence of these witnesses because they belonged to a faction in the company which was not favourably disposed towards N.C. Chouduri. A more unusual and a more impossible suggestion, I have never heard advanced. These are witnesses produced by the Crown, and put forward as witnesses of truth in support of the case for the prosecution. It has not been suggested that they turned hostile, nor during the whole trial were they treated as hostile witnesses, nor has anyone openly suggested that they were not truthful witnesses. The prosecution cannot be permitted to blow hot and cold as best to suit them. If these were not truthful witnesses, they ought never to have been called by the prosecution and so recommended to the court as witnesses of truth.
>
> This apparently stringent decision is not without qualification. One only has to read part of the following sentence which reads: 'There is no reason whatever for preferring the evidence of N.C. Chouduri to theirs ...' - to understand that in the above-quoted passage the learned judge was referring to the rule against rejection of prosecution witnesses' evidence when there is nothing to suggest contra preference against his evidence. Our present case is somewhat different. The witness Kipah is the wife of the first

> accused and she had to be called by the prosecution to fill up the chain of events in that case. Answers elicited from her cross-examination by the defence has to be scrutinised with some care. As a wife testifying in a serious case against her husband, she could not be expected to be entirely immune from being unbiased, or in any event, uninterested. Moreover, when there are other evidences to the contrary, this court is not bound to accept each and every word in her evidence. If what was suggested is to be followed in the unqualified form, the function of a trial Judge or jury will become obsolete and such function could be better decided by computer. There is nothing to deter the trial Judge or jury picking or choosing any piece of evidence from a witness while rejecting others which he or they felt not credible enough. After all a witness is capable of saying both truths and untruths. If, for any good reason, the court feels that part of his evidence should be preferred to the other, then it is at liberty to accept that part and reject the others. Indeed this has to be so when dealing with human as opposed to mechanical factors. That is partly why we are here to adjudge a case.
>
> It is noteworthy that when the case went on appeal, the former Federal Court - unusually strong upon that occasion (Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ and Hashim Yeop A. Sani J) - made no adverse comment on the methodology of evidence evaluation adopted by Wan Yahya J, in the passage quoted above.

[54] It is clear from the full judgement of the Court of Appeal in *Lim Guan Eng*'s case, in particular the passages reproduced above, that the truncated passage quoted by the learned trial judge does not at all reflect the judgement of the Court of Appeal on appreciation of oral evidence.

Duty To Consider All Evidence Adduced

[55] It is, in our view, an error to make a finding that the defence is of mere denial without evaluating all the evidence adduced throughout the trial. Not every denial is a mere denial. To determine whether it is or it is not a mere denial, the evidence adduced throughout the trial has to be re-examined and re-evaluated at the conclusion of the whole trial.

[56] We find that the learned trial judge did not give sufficient consideration to the evidence adduced at the trial as a whole. At the conclusion of the trial, the learned trial judge is required, by sub-s. 182A of the Criminal Procedure Code, to consider all the evidence adduced before the court, and only then decide if the prosecution had proved its case beyond reasonable doubt.

[57] We remind ourselves again of what was said by Suffian J in *Mat v. Public Prosecutor* [1963] 1 LNS 82; [1963] MLJ 263:

> If you accept the explanation given by and on behalf of the accused, you must of course acquit. But this does not entitle you to convict if you do not believe that explanation, for he is still entitled to an acquittal if it raises in your mind a reasonable doubt as to his guilt, as the onus of

A proving his guilt lies throughout on the prosecution. If upon the whole evidence you are left in a real state of doubt, the prosecution has failed to satisfy the onus of proof which lies upon it.

[58] In the circumstances of this case, we are of the view that it is incumbent upon us to examine and consider the evidence adduced
B throughout trial to determine whether the conviction of the appellant by the trial court can be affirmed.

Our Evaluation Of The Evidence

Defence Evidence

C The Trip To Shenzen Was With "Ah Meng" And Vikneswaran

[59] "Ah Meng" and Vikneswaran exist. "Ah Meng" gave evidence as DW2. Vikneswaran's father gave evidence of Vikneswaran's existence and friendship with the appellant. DW2 also confirmed that he and Vikneswaran went to Shenzen with the appellant.
D

[60] DW4's evidence was that Air Asia's record showed that all three of them - the appellant, DW2 and Vikneswaran - were on the flight from Kuala Lumpur to Shenzen on 28 July 2011 and sat on the same row in seats No. 30A, 30B and 30C. They were also on the same flight from Shenzen to
E Kota Kinabalu on 31 July 2011. But this time, the appellant sat in seat 27B, beside Vikneswaran in seat 27C. DW2 was in seat 27D.

[61] DW2 gave evidence his tickets for the trip to Shenzen were booked by his niece as she worked with a travel agency. He said that he only gave his niece's telephone number to the other two.

F **[62]** The evidence of DW2 and DW4 supported the appellant's evidence that he went to Shenzen from Kuala Lumpur and to Kota Kinabalu from Shenzen with DW2 and Vikneswaran and that all arrangements were NOT made by him, but for him.

G **[63]** Although DW2 claimed that he only purchased the tickets for himself and that he only gave his niece's telephone number to the other two, the evidence by DW4 clearly contradicted that evidence.

[64] DW4's evidence showed that all the tickets for the KL-Shenzen leg were paid for by credit card by Chui Han Wong. For the Shenzen-Kota
H Kinabalu leg all the tickets were bought by one Fang Zhou using credit card.

[65] We also note that DW2 admitted that he made the arrangements for the hotel. However he said that it was Vikneswaran (who was referred to as "Aboy") who paid for the hotel room Vikneswaran occupied.

I **[66]** From DW2's evidence, and the independent evidence of DW4, it is clear that the appellant played no part in making any of the travel and lodging arrangements for the trip to Shenzen and from Shenzen. This supports the appellant's evidence that he went there at Vikneswaran's invitation and with the hope of "recovering" part of the loan he gave Vikneswaran.

[67] They spent three nights "holidaying" in Shenzen, which in our view is a reasonable length of time for such a holiday.

Whether The Grey Bag P23 Was Brought By DW2

[68] The appellant's own evidence was that on the day they were leaving Shenzen, DW2 came with the grey bag P23 and the sling bag into the hotel room the appellant shared with Vikneswaran while Vicknewaran was in the bathroom. DW2 in his evidence however denied going into the room.

[69] DW2's evidence on this point was quite interesting, as can be seen from the excepts below:

Q Selepas itu sebelum kamu mahu balik bersama Aboy dan accused, kamu ada ke bilik hotel dimana diaorang duduk ketuk pintu dan masuk.

A Masa mahu balik saya ada beritahu pukul berapa saya tunggu dibawah.

Q Sebenarnya masa mahu balik ke KL kamu ada bawa satu Amoi pergi ke hotel dimana Aboy dan accused tinggal.

A Saya tidak ingat.

Q Masa kamu sampai di hotel dimana Aboy tinggal, diaorang sudah habis mandi atau tidak?

A Mungkin sudah.

Q Siapa yang belum habis mandi?

A Saya tak tahu sebab saya tak naik saya tunggu di lobby.

Put Saya katakan kepada kamu sebenarnya kamu ada masuk bilik dimana Aboy dan accused tinggal pada hari kamu mahu balik KL.

A **Saya naik 1 kali saja**.

Put Saya katakan kepada kamu masa kamu naik ialah pada masa hari kamu mahu balik ke KL.

A Tidak ingat.

Q Boleh ingat atau tidak masa kamu naik satu kali itu kamu ada kawan Amoi?

A Tak pasti.

Q Mengapa Aboy masukkan pakaian-pakaian ke dalam bag?

A Tidak tahu.

Q Semasa Aboy masukkan pakaian dalam bag ini, kamu ada masuk barang kau sendiri ke dalam bag?

A Tiada.

Q Masa kamu masuk bilik diaorang yang 1 kali itu kau ketuk pintu, masa itu yang buka pintu ini accused yang buka pintu pakai tuala saja.

A Tak ingat.

Q Yang buka pintu itu ialah accused?

A Tak ingat

Q Masa kamu masuk bilik itu, apa kamu buat dalam bilik itu?

A **Saya masuk panggil diaorang pergi makan itu saja**.

(emphasis added)

B **[70]** As can be seen above, DW2 first denied, then admitted that he went into the room occupied by the appellant and Vikneswaran on the day they were due to leave Shenzen.

[71] This evidence supported the appellant's contention that DW2 came into the hotel room that morning.

C

[72] The learned trial judge made the statement that no attempt was made by the learned defence counsel to impeach DW2. However, it could be seen from the excerpts above that some of the evidence given by DW2 was in fact supportive of the appellant's evidence, although that evidence of DW2 had to be extracted through a series of questions which amounted to D cross-examination. In those circumstances, we can very well understand why the learned defence counsel did not move to have DW2 impeached.

[73] As mentioned earlier, DW2 appeared to have been cross-examined by the learned defence counsel. The notes of proceedings do not show that this was objected to by the Deputy Public Prosecutor or disallowed by the E court. Clearly therefore DW2 was being treated as a hostile witness and the questions were allowed by the court under s. 154 of the Evidence Act 1950.

[74] DW2's evidence which supports the appellant's defence must therefore be given the weight it deserves under those circumstances.

F Whether The Grey Bag P23 Was Packed By The Appellant

[75] With regard to the packing of the grey bag, the learned trial judge had this to say:

> Further there is no evidence from the accused as to how long he was in G the shower. This is important in view of the manner in which the drugs were concealed in a secret compartment in the luggage and the evidence from the accused stating that both Vikneswaran and DW2 had to repack that bag as the accused's bag was damaged. Hence the totality of evidence does not support the contention that the accused was totally ignorant of what he was carrying. In short, his defence is a mere denial.

H

[76] As we have mentioned above, the appellant's evidence was that the grey bag P23 was brought by DW2 to the room.

[77] It was never suggested nor put to the appellant during cross-examination that the packing of the drugs was done in the hotel room I itself.

[78] The appellant's evidence was that he had four pairs of pants, four shirts, four sets of underwear, not including the clothes he was wearing. He bought two pieces of clothes in Shenzen. The grey bag was also packed with Vikneswaran's clothes. Vikneswaran, according to the appellant, bought some clothes in Shenzen.

[79] We do not think it to be unreasonable or improbable for the appellant's clothes as well as Vikneswaran's clothes to be transferred and packed in the grey bag in the time the appellant spent in the shower. We note that the appellant testified that he brought a change of clothes into the shower. In other words the appellant's time in the shower included the time he would take to change into his clothes.

[80] There is therefore nothing inherently improbable in the appellant's evidence that the grey bag was fully packed by the time he came out from the shower.

Vikneswaran's Clothes In The Grey Bag P23

[81] The learned trial judge did not address that part of the appellant's evidence that sought to show the bag also contained clothes belonging to Vikneswaran.

[82] The appellant's evidence was that he was asked by the customs officers to put on the clothes found in the grey bag. Photographs were taken and tendered of the appellant wearing the clothes. The appellant was shown the photographs during examination-in-chief. He claimed that some of the clothes did not belong to him. A perusal of the photographs shows that there were garments, such as a pair of dark blue/black long trousers, a pair of knee-length trousers, and a zipped-up yellow/cream sweater, which clearly did not fit the appellant.

[83] The appellant was not cross-examined by the learned Deputy Public Prosecutor on this ill-fitting clothes which he claimed did not belong to him.

[84] In our view, this evidence of the ill-fitting clothes supported the appellant's evidence that the bag was not packed by him but was packed by either Vikneswaran or Vikneswaran and DW2, or Vickneswaran, DW2 and DW2's female companion, and that the bag contained the appellant's as well as Vikneswaran's clothes.

Non-calling Of Vikneswaran

[85] Vikneswaran appears to be a critical character in the events leading to the arrest of the appellant. He was not called by the prosecution and was apparently not able to be located by the prosecution as well as the defence.

[86] While this may not be detrimental to the prosecution's case (as stated by the learned trial judge), in our view it was only not so up to the stage of the close of the prosecution's case.

[87] By the conclusion of the trial, the absence of Vikneswaran's evidence and thus his version of the events, especially the packing of the grey bag P23, created a gaping hole in the case against the appellant.

[88] By now, the fact that Vikneswaran travelled together with the appellant (and DW2) from KL International Airport to Shenzen, was staying in the same room as the appellant in Shenzen, and travelled with the appellant from Shenzen to Kota Kinabalu International Airport was not in dispute.

[89] Given the evidence that it was Vikneswaran who played the active role in arranging the trip to and the stay in Shenzen, the appellant's evidence that the grey bag was packed by Vikneswaran or DW2 and his girlfriend or two of them or all of them, and that some of the clothes in the bag were Vikneswaran's, the absence of Vikneswaran's evidence meant that when all the evidence adduced until the conclusion of the whole trial was re-evaluated (including the appellant's evidence) doubts had arisen as to the knowledge of the appellant with regard to the drugs hidden in the bag. This was what the learned trial judge had neglected to consider.

Prosecution's Own Evidence

The "Secret" Compartment

[90] PW3 gave evidence that the "secret" compartment in the grey bag P23 was covered by a layer with four layers of sewing, and three metal rivets, each with two screws on top of the sewing. He also testified that it was difficult to open up the base of the bag.

[91] PW6 testified that after removing the contents of the bag, he found a fabric layer at the bottom inside part of the bag. Upon opening that layer, he saw that the layer below had bulges in parts. He then tore open the fabric layer and "mengopak" (broke open) fully the inner base of both halves of the bag, using a screwdriver.

[92] PW2, who took photographs of the bag and was present when the bag was opened, agreed with the learned defence counsel when it was suggested by the learned defence counsel that "the bag had been seal [*sic*] so professionally well that to prise it open that your customs officers had to use a screwdriver to rip it open".

[93] The evidence of PW3 and PW6 would show that the "hiding" of the drugs was meticulously executed, and could not possibly have been done in the hotel room. The bag must therefore have already been "packed" with the drugs prior to being taken to the hotel room.

The Clothes That Did Not Fit

[94] PW3 admitted that he saw some clothes from the bag that the appellant was asked to put on, but did not fit the appellant. The investigating officer PW8 confirmed that in his view two of the pieces of clothes from the bag P23 that the appellant was asked to wear did not fit him.

[95] This supported the appellant's evidence that some of the clothes in the bag were not his, but belonged to Vikneswaran.

The Appellant's Reaction

[96] PW4 gave evidence during examination-in-chief that when the bag P23 was directed to be scanned for the second time, the appellant's reaction was normal. He merely asked why did the bag have to be re-scanned.

[97] According to PW4 the appellant saw him pull aside the covering of the base, but the appellant's reaction was still "biasa sahaja".

[98] PW5 gave evidence during examination-in-chief:

Q Bagaimana reaksi OKT masa Hafiz menemui plastic dari bagasi itu?

A Saya tengok dia macam relaks saja, macam tiada perasaan takut.

[99] PW6 however, gave evidence that when the plastic packets were found "OKT kelihatan agak terkejut dan gementar". During cross-examination PW6 claimed to be able to determine whether the appellant was in a state of panic or otherwise.

[100] PW7 who was also present when the examination of the bag was taking place, was not asked about the appellant's reaction.

[101] PW8 gave evidence that from the CCTV recording of the examination room at the Kota Kinabalu airport, the appellant appeared "selamba" (poker-faced) when the search was conducted on the bags. PW8, contrary to PW6, was of the view that a normal person would have been agitated and worried.

[102] In our view, when the prosecution's own witnesses gave evidence during examination-in-chief that the appellant appeared normal even when the plastic packets were discovered in the hidden compartment, that evidence should have been considered by the learned trial judge in favour of the appellant. If that evidence could support knowledge as well as absence of knowledge, the interpretation that would favour the appellant who is the accused person, should be chosen.

Defence Case Had Been Presented To The Police Before Trial

[103] The investigating officer PW8 admitted in cross-examination that the appellant had given statements to the police giving a version similar to the version the appellant later gave during his evidence, including the packing of the bag P23 by Vikneswaran or DW2 or DW2's girlfriend or two of them or all of them.

[104] Initially, PW8 claimed that the appellant did not reveal that he was travelling with DW2 and Vikneswaran when his statement was first recorded on 2 August 2011. However, PW8 had to admit that that information was given to him on 2 August 2011 when the appellant's statement given on that date was shown to him in court.

[105] PW8 admitted that he obtained the flight manifest of the Shenzen-Kota Kinabalu flight from Air Asia a few days after that incident. But on 3 August 2011, when the appellant gave his second statement, the appellant had already told PW8 of where the three of them were seated on that flight.

[106] PW8 admitted that the appellant had given all the information that he had on Vikneswaran, even the names of Vikneswaran's friends Thava and Nagendran and their telephone numbers.

[107] The learned trial judge had neglected to consider that evidence of PW8 given during cross-examination. If His Lordship had taken that evidence into consideration when evaluating the evidence adduced during the whole of the trial until its conclusion, His Lordship would have seen that the appellant's defence was not a mere denial.

Conclusion

[108] Having considered all the evidence adduced during the whole trial, we are unable to agree with the conclusion of the learned trial judge that the prosecution had proved the charge against the appellant beyond reasonable doubt.

[109] The appellant's denial of any knowledge that he was carrying dangerous drugs in the grey bag P23 was, in our view, not a mere denial. It was supported by evidence adduced during the defence stage as well as the prosecution stage.

[110] In the circumstances of the case, the appellant's conviction is clearly unsafe.

Decision

[111] Based on our analysis above, we allow the appeal and set aside the conviction and sentence of the accused. The accused was acquitted and discharged of the charge against him.

[112] We wish to record our appreciation to Mr PJ Perira, counsel for the appellant, for having agreed, on Tuesday 9 September 2014, to have the appeal heard on Friday, 12 September 2014, despite having only been informed of the date of hearing at the last minute due to the notice having been inadvertently sent to the previous counsel. We have the benefit of Mr Perira's written submission despite the late notice given to him.

[113] We also appreciate DPP Luke Ressa Balang's presence and participation in the hearing as we know he was assigned to take over the appeal only on Tuesday as DPP Awang Armadajaya bin Awang Mahmud who was the original Deputy Public Prosecutor assigned to argue this appeal was unable to do so due to the change in the date of hearing to Friday.